Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

No. 92-163

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH R. DILEO, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

CHARLES E. BROOKHART
KENNETH W. ROSENBERG
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether financial records that previously had been the subject of a grand jury subpoena were properly admitted into evidence in the Tax Court.

2. Whether an IRS agent who assisted at grand jury proceedings was ineligible to assist at the Tax Court trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Disclosure of Grand Jury Material, In re, 821 F.2d 1290 (7th Cir. 1987)	9
Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)	6
Grand Jury Proceedings, In re, 851 F.2d 860 (6th Cir. 1988)	6, 7
United States v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960)	3, 4, 7
United States v. *John Doe, Inc. I*, 481 U.S. 102 (1987)	5, 6, 9
United States v. *Miller*, 425 U.S. 435 (1976)	7
United States v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983)	5

Statutes and rules:

Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*:	
12 U.S.C. 3401-3422	7
12 U.S.C. 3420(a)	7
Fed. R. Crim. P.:	
Rule 6(e)	2, 3, 4, 5, 6, 7, 8, 9
Rule 6(e)(2)	8
Rule 6(e)(3)(A)	7, 8
Rule 6(e)(3)(B)	7, 8
Rule 6(e)(3)(A)(ii)	8
Rule 6(e)(3)(C)(i)	5, 8

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-163

JOSEPH R. DILEO, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2A-11A) is reported at 959 F.2d 16. The opinions of the United States Tax Court (Pet. App. 18A-54A, 66A-80A) are reported at 96 T.C. 858 and 58 T.C.M. (CCH) 304. The opinion and order of the district court (Pet. App. 57A-63A) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1992. The petition for rehearing was denied on April 28, 1992 (Pet. App. 1A). The petition for a writ of certiorari was filed on July 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Commissioner of Internal Revenue issued statutory notices of deficiency to petitioners for their 1978 through 1982 income tax years (Pet. App. 67A). Petitioners sought redetermination of the deficiencies in the Tax Court (*ibid.*). The Tax Court consolidated the cases for a trial to be held in January 1988 (*ibid.*).

One month prior to trial, the Commissioner served trial subpoenas *duces tecum* upon three banks, seeking production of all books, records or other documents pertaining to certain of petitioners' accounts during the period of the alleged deficiencies (Pet. App. 74A). These same records had previously been subpoenaed by a federal grand jury during a criminal investigation in 1984. That investigation led to the indictment of two of the petitioners (Joseph R. DiLeo and Walter E. Mycek, Jr.), who pled guilty to various tax-related criminal violations (*id.* at 67A-68A). After those criminal cases were closed, the subpoenaed records were not returned to the banks but were instead placed in storage (*id.* at 72A, 86A-87A). When the trial subpoenas were issued to the three banks in the Tax Court case, the banks authorized the IRS to retrieve from storage the records described in the subpoenas (*id.* at 94A-96A).

2. At trial, petitioners moved to suppress the subpoenaed records on the ground that they were obtained in violation of Rule 6(e) of the Federal Rules of Criminal Procedure, which limits disclosure of "matters occurring before the grand jury" (Pet. App. 75A). The Tax Court denied the motion, holding that the bank records obtained pursuant to the Tax Court trial subpoena were not "matters occurring before the grand jury" and were therefore not subject to the restrictions on disclosure of Rule 6(e) (Pet. App. 77A-79A).

Mycek and DiLeo then commenced a proceeding in federal district court to enjoin the Commissioner from using the subpoenaed bank records in the Tax Court trial (Pet. App. 60A). The district court declined to issue the requested injunction, holding that, under *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), the bank records did not represent "matters occurring before the grand jury" (Pet. App. 62A). The court further entered an order pursuant to Rule 6(e) authorizing the subpoenaed records to be used in the Tax Court proceeding (Pet. App. 63A). Petitioners filed a notice of appeal from the district court's order, but the appeal was dismissed pursuant to a stipulation preserving petitioners' right to pursue the same issues in any subsequent appeal from the Tax Court case (*id.* at 5A).

The Tax Court thereafter issued an opinion (Pet. App. 18A-54A) and entered decisions (*id.* at 12A-17A) upholding the deficiencies found by the Commissioner. In its opinion, the Tax Court rejected petitioners' additional claim that IRS agent Kirschen, who was assigned to assist the United States Attorney's office and the grand jury in the criminal proceedings involving DiLeo and Mycek, should have been excluded from attending the Tax Court trial (*id.* at 53A).

3. The Second Circuit affirmed. Applying the rule of *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), the court of appeals concluded that the bank records subpoenaed for the Tax Court case "clearly did not compromise the secrecy of the grand jury's deliberations" (Pet. App. 7A) and that their disclosure was not barred by Rule 6(e). The court held that, when information has been submitted to a grand jury, that does not bar its later use at a civil trial:

> [W]hen testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took

> place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

Pet. App. 7A (quoting 280 F.2d at 54). The records admitted into evidence in the Tax Court were sought for their own sake and did not reflect or represent "matters occurring before the grand jury" within the meaning of Rule 6(e) (Pet. App. 7A). Although the district court entered an order authorizing use of the bank records at the Tax Court trial (*id.* at 63A), the court of appeals concluded that no court order was necessary to permit the disclosure of the bank records pursuant to Rule 6(e) because the records did not reveal "matters occurring before the grand jury" (Pet. App. 8A).

The court of appeals further held that the presence of IRS Agent Kirschen at the Tax Court trial for the purpose of providing certified documents and hearing testimony to determine whether perjury had been committed did not violate the prohibition of Rule 6(e) against disclosure of grand jury matters (Pet. App. 10A).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. As petitioners acknowledge (Pet. 11), the courts of appeals have consistently looked to the test established by *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d at 54, in determining whether documents or other materials subpoenaed by a grand jury may also be obtained for use in civil cases. Under *Interstate Dress* (*ibid.*),

> when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful

> investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

Petitioners do not (and cannot) dispute that the bank records sought in this case were subpoenaed for the Tax Court trial because of their "intrinsic value" to that civil case and not to ascertain what transpired before the grand jury. Petitioners instead contend (Pet. 11) that *Interstate Dress* and the decision in this case conflict with decisions of this Court. That contention was correctly rejected by the court of appeals (Pet. App. 6A-7A).

Petitioners first assert that *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), conflicts with the rule of *Interstate Dress*. But *Sells Engineering* did not even address the question of what type of documents or other information constitute "matters occurring before the grand jury" for the purpose of Rule 6(e). Instead, *Sells Engineering* concerned whether Justice Department attorneys and their staff are permitted automatic disclosure of grand jury materials (pursuant to Rule 6(e)(3)(C)(i)) without any requirement of judicial authorization. See 463 U.S. at 420, 427-442. In determining that judicial authorization is required for disclosures to government attorneys "other than prosecutors" (*id.* at 435), the Court did not address, mention or decide what types of information would disclose "matters occurring before the grand jury" under Rule 6(e).

Petitioners also claim (Pet. 14) that the rule of *Interstate Dress* was rejected by *United States* v. *John Doe, Inc. I*, 481 U.S. 102 (1987). The question in *John Doe, Inc. I* was whether a government attorney to whom "matters occurring before a grand jury" have properly been disclosed in a criminal case must obtain judicial au-

thorization to use such materials "in the civil phase" of the dispute. *Id.* at 104. The court held that "Rule 6(e) does not require the attorney to obtain a court order before refamiliarizing himself or herself with the details of a grand jury investigation." 481 U.S. at 111. That decision obviates the need for the government attorney to distinguish between "matters occurring before the grand jury" and other sources of information obtained in preparing the civil litigation. *John Doe, Inc. I* does not, however, address what constitutes "matters occurring before a grand jury" and thus has no bearing on the issue presented in this case.[1]

b. Petitioners err in contending (Pet. 16-17) that the decision of the court of appeals conflicts with *In re Grand Jury Proceedings*, 851 F.2d 860 (6th Cir. 1988). In considering whether certain business records that had been turned over to a grand jury pursuant to a subpoena were "matters occurring before the grand jury," the Sixth Circuit stated in *Grand Jury* (851 F.2d at 866):

> We recognize that there may be situations in which information is sought coincidentally "for its own sake" independent of a grand jury investigation and thus do not implicate the secrecy concerns of rule 6(e). In *Interstate Dress Carriers*, for example, the documents sought under a 6(e) request were the sole copies of certain records sought by the Interstate

---

[1] For the same reason, petitioners' reliance (Pet. 15) on *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), is misplaced. That case concerned whether the court supervising the grand jury or the civil court that has jurisdiction over the proceeding for which specific grand jury information is sought is to rule on disclosures under Rule 6(e). See 441 U.S. at 213. *Douglas Oil* involved transcripts of grand jury proceedings (see *ibid.*) and thus did not seek to define the *type* of information to which Rule 6(e) applies.

> Commerce Commission; the company previously had turned them over to the grand jury.

The Sixth Circuit thus recognized that certain documents, by their nature, do not represent "matters occurring before the grand jury." The bank records involved in this case are such records. The information in those records is of the type ordinarily available by civil discovery—indeed, the banks that supplied the records authorized the production of those documents to the Internal Revenue Service in this case (Pet. App. 94A-96A).[2] Disclosure of these records would not reveal the nature, scope, or direction of the grand jury inquiry. See 851 F.2d at 867. As the court of appeals correctly concluded, the records "clearly did not compromise the secrecy of the grand jury's deliberations" (Pet. App. 7A) and did not constitute "matters occurring before the grand jury" within the meaning of Rule 6(e).[3]

c. Petitioners also claim (Pet. 12-13) that the analysis of *Interstate Dress* was repudiated by amendments to Rule 6(e)(3)(B) adopted in 1977. That contention is insubstantial. Rule 6(e)(3)(A) limits the disclosure "of

---

[2] *Interstate Dress* held that "[d]ocuments produced pursuant to a grand jury subpoena remain the property of the person producing them * * * and their inspection by persons other than the grand jury and the prosecuting attorneys is therefore dependent upon the consent of the owner *or* upon a court order." 280 F.2d at 54 (emphasis added). As the court of appeals noted (Pet. App. 8A), the banks consented to the use of documents submitted to the grand jury to satisfy the subpoena in this case. Whether to comply with the subpoenas was a matter for the banks, rather than petitioners, to decide. *United States* v. *Miller*, 425 U.S. 435 (1976).

[3] Petitioners' invocation (Pet. 18-19) of the Right to Financial Privacy Act, 12 U.S.C. 3401-3422, is unavailing. That statute limits use of covered records, when subpoenaed by a grand jury, to the purposes authorized by Rule 6(e). See 12 U.S.C. 3420(a). The statute does not define, enlarge or restrict the scope of Rule 6(e).

matters occurring before the grand jury" (Fed. R. Crim. P. 6(e)(3)(A)). If such "matters are disclosed" pursuant to that Rule, then Rule 6(e)(3)(B) specifies that the "person to whom such matters are disclosed [under Rule 6(e)(3)(A)(ii)] * * * shall not utilize that grand jury material" for any reason other than the reason for which the disclosure was authorized (Fed. R. Crim. P. 6(e)(3)(B)). The "grand jury material" referred to in Rule 6(e)(3)(B) thus constitutes, by definition, the "matters occurring before the grand jury" that have been disclosed pursuant to Rule 6(e)(3)(A). Subpart (B) of Rule 6(e)(3) does not *expand* the definition of "matters occurring before the grand jury," as petitioner contends; instead, it describes the subset of such matters that have been disclosed by order entered under subpart (A) of the Rule. Thus, nothing in subpart (B) in any way alters or conflicts with the analysis of *Interstate Dress*, and, since the Rule was amended in 1977, no court has adopted petitioners' contrary claim.

d. Even if the bank records involved in this case constituted "matters occurring before the grand jury," the order of the district court validly authorized the disclosure (Pet. App. 63A). Rule 6(e)(3)(C)(i) permits the district court to authorize disclosure "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i). Moreover, even if use of the records had *not* been authorized by Rule 6(e), the remedy in such a case would be a finding of contempt against the individual violating the rule, not suppression of the evidence. The remedy of contempt is the sole remedy provided by Rule 6(e)(2).

2. Petitioners contend (Pet. 21-22) that the Tax Court improperly allowed IRS Agent Kirschen to be present at trial for the purpose of providing certified documents and hearing testimony to determine whether there was any reason to believe that perjury had been

committed. As the court of appeals correctly held in this case (Pet. App. 10A), a government employee may participate in the civil phase of a dispute without obtaining a court order under Rule 6(e). *United States* v. *John Doe, Inc. I*, 481 U.S. at 107-111; *In re Disclosure of Grand Jury Material*, 821 F.2d 1290, 1292 (7th Cir. 1987). Petitioners acknowledge (Pet. 21-22) that there is no basis for an assertion that the IRS agent disclosed grand jury information in connection with the Tax Court proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

CHARLES E. BROOKHART
KENNETH W. ROSENBERG
Attorneys

AUGUST 1992